

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JAMES W. STARKS</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,056,247
	)	1,055,233
<b>RENO COUNTY</b>	)	
Respondent	)	
AND	)	
	)	
<b>KANSAS WORKERS RISK CO-OP</b>	)	
<b>TRAVELERS INDEMNITY CO.</b>	)	
Insurance Carriers	)	

**ORDER**

Respondent and Kansas Workers Risk Co-Op requested review of the March 14, 2014, Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on July 23, 2014, in Wichita, Kansas.

**APPEARANCES**

Matthew L. Bretz, of Hutchinson, Kansas, appeared for the claimant. Jeffrey R. Brewer, of Wichita, Kansas, appeared for respondent and its insurance carrier Kansas Workers Risk Co-Op (KWORCC). William L. Townsley, of Wichita, Kansas, appeared for respondent and its carrier Travelers Indemnity Co. (Travelers).

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument to the Board the parties stipulated that they did not dispute the functional impairment or permanent partial general disability findings of the ALJ in the Award. The Board notes the stipulations listed under Docket No. 1,055,233, list temporary total disability (TTD) payments of 19 weeks at a weekly rate of \$273.61, totaling \$2,599.390. This calculation is incorrect, as 19 weeks at \$273.61 calculates to \$5,198.59.

The Board will examine the calculations contained in the Award, making any corrections necessary.

### **ISSUES**

In Docket Number 1,056,247, the ALJ adopted the opinions of Paul Stein, M.D., as the most credible and awarded claimant an 89.5 percent permanent partial general (work) disability. In Docket Number 1,055,233, the ALJ limited the award to 19 weeks of temporary total disability compensation at the rate of \$182.42 per week.<sup>1</sup> That Award was assessed against respondent.

Respondent and KWORCC appeal, arguing the last accident of March 24, 2011, was the cause of claimant's permanent impairment and disability. Therefore, benefits should be assessed against the carrier with the coverage at the time of the March 24, 2011, accident, Travelers. Respondent and KWORCC contend the ALJ would have come to this conclusion had he not disregarded claimant's testimony and relied solely on the opinion of Dr. Stein. Respondent and Travelers contend Dr. Stein did not sufficiently followup with claimant on the issue of date of accident and injury and which accident was the most painful and physically damaging to claimant.

Claimant contends he has proven he sustained injury on three occasions, suffering a 10 percent whole body functional impairment followed by a work disability. Claimant argues the Board should affirm the Award.

Respondent and Travelers argue the Award should be affirmed. It is Travelers' position that claimant's need for medical treatment and resulting permanent disability arose out of his two injuries while working for respondent on June 10, 2009, and September 10, 2010, both of which occurred during KWORCC's coverage period.

The issues listed on appeal are:

1. Did Administrative Law Judge Klein err in determining all of Claimant's benefits for permanent partial disability and medical compensation be assessed against respondent and KWORCC and none against Travelers?

2. What is the appropriate date(s) of accident for awarding Claimant's permanent partial disability benefits under Docket Nos. 1,055,233 or 1,056,247?

---

<sup>1</sup> The parties were unable to explain the weekly rate utilized by the ALJ. The parties requested an explanation, if possible, from the Board.

3. Did the ALJ err in awarding 19 weeks of TTD against Travelers at the weekly rate of \$182.42?<sup>2</sup>

#### FINDINGS OF FACT

Claimant testified at his June 10, 2011, deposition that he was a high school graduate with an architectural design degree, a structural engineering degree, and an art degree, all from Missouri Western University. This testimony however turned out to be false as claimant testified at regular hearing he did not have a degree in engineering or art.<sup>3</sup> Claimant also testified he was never in the military, although his history provided to various health care providers includes a military history, including tours in Vietnam and resulting post traumatic stress disorder (PTSD).

Before claimant began working for respondent, he worked for McCurdy Motor Company, in Hutchinson for five years selling cars. This job required very little physically. He performed tire changes, changed batteries, shoveled snow, swept and cleaned, but nothing he considered strenuous. While working for McCurdy, claimant slipped and fell on ice, hitting his head, shoulder, right elbow and left hip. He had surgery on his right elbow to have a bursa sac removed. The elbow surgery was performed by Dr. Severud. Claimant received chiropractic treatment for his hip with Gerald N. Berning, D.C. Claimant had arthroscopic surgery on his right knee with Dr. Severud. Claimant resigned from this job.

Claimant performed freelance work in general contract remodeling for a while and then went to work for the City of Hutchinson for two years as a crew foreman performing construction and maintenance of all city properties and buildings. These were labor-intensive jobs. He also supervised workers. This job ended after claimant was in an accident and his employment was terminated. Claimant stepped off a ladder and fell backwards on his shoulder and head. Claimant testified to having neck pain during the time he worked for the City of Hutchinson in 2000. Claimant received injections for his neck at C4-5 with Dr. Dory. Claimant had no lasting problems with his neck from this accident.

---

<sup>2</sup> This figure represents approximately two-thirds of the TTD rate based on claimant's average weekly wage from the accident on June 10, 2009, and the TTD ordered by ALJ Moore on July 5, 2011, and September 26, 2011. If that is the basis for the Award against Travelers, the justification for using that figure remains unclear as that weekly wage and TTD rate do not apply to the date of accident under Travelers' coverage period.

<sup>3</sup> See R.H. Trans. at 28-30.

In 2007, claimant was hospitalized at Wesley Medical Center for septic shock and renal failure. Claimant does not know what caused this, but he recovered after a couple of months in the hospital and six months of outpatient treatment.

Claimant began working for Reno County Public Works in May 2009 as an Equipment operator. He was required to take a preemployment physical at Hutchinson Clinic. Claimant's job duties included driving a dump truck; shoveling; repairing equipment; running a backhoe, road grater, bobcat, and high loader; paving roads, etc. He worked under roads and bridges, building and repairing them. He worked 40 hours a week, Monday through Thursday, 7:00 a.m. to 5:30 p.m. with very little overtime. He was paid \$12.85 an hour. Claimant considered the job physically demanding, requiring him to lift up to 80 pounds on a regular basis.

On June 10, 2009, claimant was tasked with changing sideboards on dump trucks. Claimant testified the sideboards are two by fours and in the winter they splinter and need to be replaced. As claimant was climbing into the back of a truck, he threw his right leg over a rail and attempted to put his foot down into the inside step of the truck bed when his pant leg got caught on a splinter in a board and his right foot slipped off the inside step. Claimant fell, hitting his head and shoulders as his left leg remained in the air. Claimant hung for about two and half minutes before he was freed.

Once claimant was freed, he cleaned himself up and continued to work the rest of his shift. That evening, claimant developed pain in his left leg and burning in his hip. He described it as radiating, stabbing and burning. When claimant returned to work the next day, he was limping and reported his pain to his supervisor, Tom Collins. Two days later, claimant was asked if he could continue to work and he reported he thought he could. An appointment was made with Dr. Berning, who provided claimant with chiropractic treatment and suggested claimant get an MRI. An appointment was made with William R. Savage, M.D., respondent's workers compensation doctor. A July 2, 2009, MRI revealed a bulging disc at L4-5 and degenerative disc disease at all lumbar levels except L3-4. Epidural injections were recommended. Claimant underwent three injections with Douglas A. Friesen, M.D., over a 12 to 15 week period. Claimant continued to work while receiving treatment. Claimant's symptoms included low back pain, numbness with tingling and sensitivity and weakness of the left ankle and toes and tingling of the right great toe and second toe.

Claimant seemed to do well with the injections for about a year. He worked under a temporary 60 pound lifting restriction and then went back to work full duty, lifting as much as 80 pounds. Claimant testified he had never been symptom free since the initial fall. Claimant acknowledged having foot problems before the fall, but continued to work because he had to. Claimant continued to complain of his left foot being numb from his instep forward and in his toes. He had no complaints about his right foot at that time.

In September 2010, claimant injured his back after the sole of his boot hung up on the lower step of the grates on his work truck. Claimant could not get his foot loose and he fell down onto the dirt and grass in a ditch. Claimant's foreman immediately ran over to see if he was alright and claimant reported he wrenched his back. Claimant thought he would be alright and continued with his work. No accident report was filled out, because he thought he was still under Dr. Friesen's care and didn't need to do so. Claimant told the foreman that if he got any worse he would ask to see Dr. Friesen.

Two days later, claimant asked to see Dr. Friesen. Dr. Friesen would not see claimant without a referral from Dr. Savage. Upon referral, claimant was provided another series of epidural injections, with the first occurring on December 30, 2010, the second on January 13, 2011, and a third injection on January 27, 2011. Claimant testified that the injections did not help and actually made his bulging disk worse. Claimant's symptoms included low back pain, bilateral leg pain, left calf and toe numbness and tingling into the toes on his right foot. After claimant's last injection under the care of Dr. Friesen, he returned to Dr. Savage to discuss further treatment.

When claimant saw Dr. Savage on February 11, 2011, he was having more difficulty, although he was still working. Claimant's straight leg raising was positive on the left. He was again diagnosed with lumbar disk disease. Respondent was contacted and a referral to a neurosurgeon was anticipated.

On March 24, 2011, claimant suffered another accident when he attempted to help coworkers tarp a truck in high winds. He was knocked around by a tarp on the truck, but caught himself on his right leg before he fell all the way to the ground. Claimant reported this to his foreman, Kevin. Claimant's symptoms included numbness in his right foot from his instep to his toes, burning and stabbing pain from the calf to the tip of the toes on his left leg, burning pain in the left hip and buttocks and pain in his back on the right side above the belt line and all the way down the left side. Claimant reported his pain being an 8 to 9 on the pain scale. Claimant's symptoms were constant and sleeping, sitting and walking were difficult.

Claimant asked to go for medical treatment after this incident, but was told to wait until Monday because it was the end of the day and overtime would not be approved. Claimant had trouble sleeping that night and the next day he called Kevin, the foreman, and reported he was no better and needed to see a doctor. He didn't know if his problems were the same as the last time, but he had stabbing, burning and radiating pain in his leg. Claimant was given permission to see the doctor and was told that an accident report would be completed Monday.

Claimant called Dr. Savage to get an appointment, but was refused. Claimant was forced to wait until after the weekend to talk with management about the situation and then nothing happened. Claimant continued to inquire about seeing a doctor and continued to

limp. Claimant reached the point he couldn't perform a lot of his work duties because of the pain. Because the pain was interfering with his ability to do his job, claimant sought out an attorney and was able to get an appointment with Verlin Janzen, M.D., respondent's new physician on April 4, 2011. Claimant presented with numbness and burning in the left lower extremity with some numbness in the right foot. Dr. Janzen prescribed pain medication and recommended an MRI. The July 29, 2011, MRI scan of the lumbar spine displayed a small disk protrusion at T11-12, more on the right without degenerative changes and moderate stenosis at L3-4 and L4-5.

Claimant testified his pain level changes daily. He indicated his symptoms since the March accident are the same symptoms he had in 2009, but have been much worse. His symptoms after March 24 included burning pain in his left calf from mid calf to the tip of his toes, the left side of his hip and his back, at times. Claimant also had additional symptoms in his right foot after the March accident

Claimant testified the March 2011 accident caused him the most significant injuries. The first two accidents 2009 and 2010 involved his left hip and down the left leg, although the medical reports do indicate some right lower extremity involvement. The last accident in 2011 involved the left hip and left leg down to the toes and the right leg and right thigh down to the toes. Respondent was unable to accommodate claimant's restrictions, so he is not working. He has tried to find other work, but has not been successful.

Claimant attributes his lower back and left leg injuries to his work for respondent. He testified he can't stay active and has not been the same since his back surgery with Dr. Henry, although he acknowledged he had a good result from the surgery. Part of his inability to do things is the fact that he is 60 years old. Claimant's activities in the course of a day are walking a little on a treadmill, washing dishes, pushing a vacuum around the house and visiting with his kids and grandkids.

Claimant had not worked steadily since April 5, 2011, because of work restrictions. However, he did some painting for a friend, spending two months on a project and was paid less than \$200.

Claimant met with board certified neurosurgeon Paul Stein, M.D., for a court ordered independent medical examination (IME) on September 13, 2011. Claimant had complaints of bilateral lower extremity symptomatology, greater on the left. Claimant reported his pain started in the left hip/buttock with burning and stabbing along the left lateral thigh, and extended into the left leg below the knee to the foot. He also had burning in the bottom of both feet and numbness in the left calf and foot. He rated his daily pain at 8 to 10 on a scale of 10.

Dr. Stein examined claimant and found lower back forward flexion 20 to 30 degrees with the inability to straighten up fully; left sided antalgic limp, with the ability to walk on

heels and toes; prominence and tightness of the left paraspinal lumbar musculature; tenderness to palpation present over the left lower back; knee reflexes hypoactive and equal; ankle reflexes absent bilaterally; full strength in the muscles of the lower extremities; pinprick perception decreased in the left foot and extended along the lateral calf; and straight leg raising on the left was positive with claimant resisting considerably.

Dr. Stein was provided the records on the MRI scan from July 2, 2009. It is unclear whether he had the actual films. Dr. Stein was provided, for his review, the scans from MRI studies done on July 29, 2011, and September 11, 2011. The July scan displayed a small disk protrusion at T11-12 more on the right and moderate stenosis at L3-4 and L4-5. The September MRI displayed degenerative changes at all levels of the lumbar spine with minimal change at L3-4, moderate stenosis at L4-5 and the greatest stenosis at L2-3.

Dr. Stein opined it is more likely than not that there was a significant symptomatic aggravation in September 2010 which did not respond to treatment. He felt there was no documentation that the March 24, 2011, incident caused a further permanent aggravation as claimant was still considerably symptomatic and there was no indication that he had recovered from the September 2010 injury. Dr. Stein diagnosed claimant with spinal stenosis, likely aggravated by the September 2010 incident. Dr. Stein recommended a lumbar myelogram/CT scan and EMG/NCT of the lower extremities. He did not feel claimant could return to work at that time. Surgical intervention was mentioned as a possible next step.

On October 10, 2011, Dr. Stein reported claimant was unable to complete the October 3, 2011, EMG/NCT due to severe pain in the lower extremities. He reviewed the lumbar myelogram/CT scan performed on October 7, 2011, and noted it revealed moderate central stenosis at L4-5 and degenerative changes at multiple levels throughout the lumbar spine, particularly L5-S1. Without all of the testing being completed, Dr. Stein was not able to determine if claimant would benefit from surgery. He recommended a second attempt to obtain an EMG/NCT of the lower extremities.

Dr. Stein evaluated claimant again on April 9, 2013. He noted claimant underwent surgery with Dr. Henry on February 18, 2012, and the surgery proved helpful. Dr. Stein found claimant to have substantial degenerative disk disease in the lower back, which was aggravated on at least three occasions at work with slight retrolisthesis of L2 on L3, which was preexisting. He continued to believe the major factor leading to claimant's situation was the September 2010 incident. He was not able to determine how the March 2011 incident affected claimant. He went on to find claimant at maximum medical improvement unless x-rays proved otherwise. He assigned a 20 percent permanent partial impairment of function to the body as a whole for loss of range of motion.

Dr. Stein recommended permanent restrictions of avoiding lifting more than 30 pounds very occasionally; no repetitive lifting; avoid lifting from below knuckle height or

about chest height; avoid repetitive bending and twisting of the lower back and alternate sitting, standing, and walking at least on a half hour basis if needed. Dr. Stein found claimant to have a 78.8 percent task loss having lost the ability to perform 26 out of 33 tasks.

Claimant first met with David Hufford, M.D., on October 14, 2011, for a court-ordered evaluation and treatment of the injuries to claimant's low back, which occurred on March 24, 2011. Dr. Hufford noted claimant had three back injuries. Claimant reported low back pain radiating to the left leg with paresthesias of both feet, the left more than the right. Examination revealed no direct vertebral tenderness, but there was tenderness on the left of the paraspinous musculature and tenderness of the right side of the SI joint. There was one trigger point noted above the left iliac crest; FABER's test was positive on the left; strength for all major muscle groups was 5/5 and symmetric in the lower extremities; SLR was positive on the left, negative on the right; and reflexes 2/4 at the right knee, 1/4 at the left knee and 0/4 at the ankles.

Dr. Hufford diagnosed low back pain with a herniated L5-S1 disc. He referred claimant to a spine surgeon to determine if surgery would be beneficial and provided claimant with pain medication. Dr. Hufford did not believe claimant was in need of pain management. He reviewed claimant's task list and found that out of 33 tasks, claimant can no longer perform 26 for a 79 percent task loss.

Claimant had surgery at L3-4-5 and S1 with Matthew Henry, M.D., on February 18, 2012, consisting of a three level decompressive laminectomy, bilateral medial facetectomy and foraminotomy and left L5-S1 medial facetectomy and foraminotomy. Since the surgery, claimant has good and bad days. Claimant has problems sitting, standing and sleeping. He testified that because of the pain in his left hip he must cross his legs to relieve the pressure. Since his surgery he doesn't having burning in his hip, but does have symptoms in his lower back through his hip, left leg, and right and left feet. He has shooting pain down his left leg through his hip and into his feet. He reported continued numbness and tingling in his toes in both feet.

Dr. Hufford performed another examination of claimant on October 11, 2012. This visit was post surgery with Dr. Henry. Claimant presented with constant low back pain that occasionally becomes a 6 to 7 on the pain scale, after sitting, standing or walking for prolonged periods. Claimant denied radiation of low back pain into his legs, but did report constant numbness and paresthesia in the feet.

Upon examination, Dr. Hufford found claimant to have an aggravation of lumbar degenerative disc disease and spinal stenosis from a work-related fall. He assessed claimant a 10 percent whole person impairment based on the presence of a significant right leg radicular component following injury and musculature asymmetry in the symptomatic leg. This rating was from the Lumbosacral DRE Category II of the AMA



*Guides.* He recommended restrictions of frequent lifting up to 10 pounds, occasional lifting up to 20 pounds; occasional bending at the waist and twisting and turning of the trunk; occasional standing and walking allowance for frequent posture changes to achieve a position of comfort. Dr. Hufford did not feel claimant was permanently and totally disabled, but rather found him capable of finding employment within the recommended restrictions.

It was Dr. Hufford's understanding that claimant had three separate dates of accident. It was his opinion that 100 percent of the 10 percent impairment he assigned claimant was the result of the injury on March 24, 2011. He believed the third injury resulted in claimant's surgical intervention. Dr. Hufford opined there was not enough in the records to document or refute the presence of radiculopathy prior to the third work injury. Dr. Hufford testified he did not have enough information to apply any portion of the impairment to the first two accidents.

In his October 29, 2012, letter to claimant's attorney, Dr. Hufford wrote claimant would need chronic lifelong treatment and pain management, which could be provided by a primary care physician.

At the request of his attorney, claimant met with Pedro Murati, M.D., for an examination on August 8, 2012. Claimant had complaints of constant low back pain, pain in both hips, burning and numbness in both feet and difficulty sleeping due to low back pain. Claimant acknowledged he had preexisting issues.

Dr. Murati diagnosed claimant status post L3, L4 and L5 decompressive laminectomy and bilateral medial facetectomy and foraminotomy; left L5-S1 medial facetectomy and foraminotomy; and left SI joint dysfunction. Dr. Murati opined that his diagnosis was within all reasonable medical probability a direct result from the work-related injuries on June 10, 2009, September 20, 2010, and March 24, 2011, during claimant's employment with respondent. He recommended yearly follow-ups on the lumbar spine and assigned the following permanent restrictions based on an 8 hour day: no bending, crouching for stooping; no crawling; no lifting, carrying, pushing or pulling 20 pounds, 20 pounds occasionally and 10 pounds frequently; rarely climb stairs or ladders; rarely squat; occasionally sit; occasionally drive; frequently stand and walk; alternative sitting, standing and walking.

Dr. Murati assigned claimant a 15 percent whole person impairment for status post decompressive laminectomy and bilateral medial facetectomy and foraminotomy. This impairment falls between Lumbosacral DRE Category III and IV. He opined this rating was incomplete until he was able to receive and review all preexisting lumbar spine records. Upon review of those records, Dr. Murati found claimant to have a 5 percent preexisting impairment and therefore claimant's whole person impairment was found to be 10 percent from the three accidents. Dr. Murati's letter of September 20, 2012, fails to state which date of accident, if any, caused most of the impairment. He simply opines the 10 percent

functional impairment was sustained on the three dates of accident, with no further explanation.

Upon review of a task list, Dr. Murati found claimant to have a 94 percent task loss, having lost the ability to perform 31 out of 33 tasks. He does however feel claimant is able to work in the open labor market.

#### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>4</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>5</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>6</sup>

The Board has, on occasion, dealt with contested dates of accident. That is not the case here. Claimant has experienced three separate accidents with resulting injuries after each. Whether claimant experienced these accidents is not disputed. However, the dispute regarding which accident caused claimant's permanent functional impairment and/or disability is hotly contested. Of the three accidents suffered by claimant, the first occurring on June 10, 2009, appears to be the least invasive or damaging. Claimant missed no work as the result of this accident. The epidural injections administered after the accident benefitted claimant to the point he was able to continue his regular work, ultimately without limitations or restrictions, and claimant testified the treatments improved his condition.

Neither Dr. Stein nor Dr. Hufford found this first accident resulted in any permanent impairment. Only Dr. Murati gave this incident any credence when weighing what permanent damage claimant may have suffered. Dr. Murati's opinion is unclear as to whether this accident actually resulted in any portion of his opined 10 percent whole body permanent functional impairment. The Board finds claimant's accident on June 10, 2009,

---

<sup>4</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

<sup>5</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>6</sup> K.S.A. 44-501(a).

resulted in temporary injuries to claimant's back and lower extremities. The treatment provided, including the epidural injections, lead to claimant's return to work, eventually without limitations. Although claimant continued to display some minor symptoms, no permanent impairment or disability is attributed to that accident.

The Board has, in the past, consistently ordered each carrier to pay the temporary total disability compensation and medical expenses incurred during its periods of coverage.<sup>7</sup> And the Court of Appeals has affirmed that procedure.<sup>8</sup> Respondent and its insurance company, KWORCC are liable for any medical treatment and temporary benefits from the June 10, 2009, accident.

The remaining dates of accident, September 20, 2010, and March 24, 2011, left claimant with significant limitations, both physically, and from a work disability standpoint. The Board finds claimant suffered personal injury by accident on both September 20, 2010, and March 24, 2011, with both accidents arising out of and in the course of claimant's employment with respondent.

The March 24, 2011, accident resulted in more symptoms into claimant's lower right extremity and was followed by claimant being unable to return to work and undergoing surgery. However, the September 20, 2010, accident lead to a series of unsuccessful epidural injections and to a proposed surgical consult. Dr. Stein and Dr. Hufford disagree regarding the significance of each incident. Dr. Stein found the September 20, 2010, accident to be the cause of claimant's permanent impairment and need for surgery. Dr. Hufford determined the March 24, 2011, accident was the culprit necessitating the surgery and resulting permanent impairment. Dr. Murati's opinion remained unclear as to his assessment of the extent of damage resulting from the three accidents and will be given little weight in this determination.

The Board makes it a practice to determine specific dates of accident and resulting disabilities when possible. However, there are occasions when such findings are not possible. Quagmires have resulted in the past when dealing with multiple insurance carriers covering the same employer, with an employee who has suffered more than one accident. The Board has found multiple insurance companies to be jointly and severally

---

<sup>7</sup> See e.g. *Lott-Edwards v. Americold Corporation*, No. 175,770, 175,771 & 223,800, 1998 WL 921307 (Kan. WCAB Dec. 28, 1998).

<sup>8</sup> See *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 697, 6 P.3d 947 (2000).

liable for medical expenses and temporary disability awards when the record does not allow a resolution of the disputes over respective liabilities.<sup>9</sup>

In this instance, it is not possible, based upon the conflicting medical evidence from Dr. Stein and Dr. Hufford, to determine whether claimant's permanent injuries and disabilities resulted from the September 20, 2010, date of accident or from the March 24, 2011, date of accident. An award against either or both dates of accident can be supported by this record. The Board finds the liability of the insurance companies cannot be separated. As such, the Board finds the liability to be joint and several from the last two accidents and resulting injuries.<sup>10</sup>

The Kansas Supreme Court has long allowed joint and several liability awards in workers compensation proceedings with multiple insurance companies.<sup>11</sup> The Court, in analyzing the district court's decision in *Kuhn*, held that the district court's findings were "equivalent to a finding that the claimant's present total disability has resulted from the combined effects of the injuries sustained by him in the accidents of October 12, 1965, and June 22, 1966, both of which occurred while claimant was in the employ of Grant county."<sup>12</sup>

Additional justification for allowing a joint and several liability determination was provided by the Supreme Court in *Kuhn* when the Court stated:

"The present action presents a graphic illustration of the hardship which may confront a claimant where insurance carriers are permitted to litigate, during the compensation process, claims and equities existing between themselves. . . .

These are adversities which a claimant should not be forced to undergo. While we recognize the right of insurance carriers to be protected in their legal rights and to engage in litigation when disputes over their respective liabilities arise between them, yet their

---

<sup>9</sup> See *Tull v. Atchison Leather Products and Berger Co., Inc.*, No. 258,286, 2005 WL 3407980 (Kan. WCAB Nov. 17, 2005); affirmed by the Kansas Court of Appeals in *Tull v. Atchison Leather Products, Inc.*, 37 Kan. App. 2d 87, 150 P.3d 316 (2007).

<sup>10</sup> Based upon the ruling of the Court of Appeals in the unpublished decision in *Barker v Grace, Unruh & Pratt*, No. 108,223, 2013 WL 5187413, (Sept. 13, 2013), claimant is limited to one maximum \$100,000 award under K.S.A. 44-510f(a)(3).

<sup>11</sup> *Kuhn v. Grant County*, 201 Kan. 163, 439 P.2d 155 (1968); See also: *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 239 P.3d 51 (2010).

<sup>12</sup> *Id.* at 170.

quarrels should not be resolved at the expense of an injured workman.”<sup>13</sup>

Support for a finding of joint and several liability was demonstrated at the oral argument to the Board. After the attorneys for the insurance companies presented their respective positions, arguing at length, the attorney for the claimant merely echoed the Board’s confusion regarding the 19 week TTD award against Travelers, providing no additional comment. The parties had already acknowledged this claimant is entitled to a 20 percent functional impairment to the whole body followed by a work disability of 89.5 percent. The only question remaining is which insurance company should pay. The frustration of the Supreme Court in *Kuhn* is graphically illustrated herein.

Claimant has suffered three separate accidents while employed with respondent. The Board has already held the first accident on June 10, 2009, was of a temporary nature. Any temporary disability and medical benefits from that accident are the responsibility of respondent and KWORCC. Likewise, the accident on September 20, 2010, occurred during the coverage of KWORCC, and any medical treatment or temporary disability benefits incurred prior to March 24, 2011, are the responsibility of KWORCC.

Respondent and Travelers, remain responsible for the previously ordered 19 weeks of TTD. However, the wage stipulation filed by the parties lists an average weekly wage after May 1, 2011, of \$636.11 resulting in a TTD rate of \$424.09. The award of TTD during this period will reflect the accurate weekly rate for payments after May 1, 2011. The Award of the ALJ is modified accordingly.

Finding the medical opinions of Dr. Stein and Dr. Hufford equally persuasive, the Board finds claimant’s need for surgery and any permanent award to which he is entitled from these accidents is equally the responsibility of KWORCC and Travelers. Any permanent disability benefits, either for functional impairment or work disability incurred on or after March 24, 2011, and any medical treatment incurred on or after March 24, 2011, is the shared responsibility of both KWORCC and Travelers, to be paid jointly and severally. The Award of the ALJ is hereby modified accordingly.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified as noted above. Respondent and KWORCC are liable for all medical treatment and temporary benefits necessitated by the accidents occurring on June 10, 2009, and September 20, 2010. Respondent and Travelers remain liable for 19 weeks of TTD at the weekly rate of \$273.61, totaling \$5,198.59. The

---

<sup>13</sup> *Id.* at 171-172.

remaining medical and permanent disability liability is ordered paid, jointly and severally, between KWORCC and Travelers, for all benefits, medical, impairment and disability, resulting after the accident on March 24, 2011.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated March 14, 2014, is modified as above noted.

Claimant is entitled to 31.71 weeks of TTD at the rate of \$330.42 in the sum of \$10,477.62, plus 30.72 weeks of TTD at the rate of \$424.09 per week totaling \$13,028.04, totaling 23,505.66, to be paid by respondent and KWORCC.

Claimant is also entitled to 19 weeks of TTD at the modified weekly rate of \$424.09, totaling \$8,057.90, to be paid by respondent and Travelers.

Thereafter, claimant is entitled to 161.37 weeks of compensation at the rate of \$424.09 totaling \$68,436.44, for a total award not to exceed \$100,000.00. The permanent disability compensation and all medical treatment provided after March 24, 2011, is the joint and several responsibility of respondent and its insurance carriers, KWORCC and Travelers.

As of the date of this award, claimant is entitled to 31.71 weeks of TTD at the rate of \$330.42 and 30.72 weeks of TTD at the rate of \$424.09 and 19 weeks of TTD at the rate of \$424.09, totaling \$8,057.90, followed by 161.37 weeks of permanent partial disability compensation at the rate of \$424.09, totaling \$68,436.44, for an award not to exceed \$100,000.00, all of which is due and owing and ordered paid in one lump sum minus any amounts previously paid. Respondent and KWORCC are responsible for the TTD and medical treatment stemming from the accidents on June 10, 2009, and September 20, 2010. Respondent and KWORCC and Travelers are responsible for the medical treatment and permanent disability stemming from the accident on March 24, 2011, with the insurance companies jointly and severally liable as above determined. In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August, 2014.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Matthew L. Bretz, Attorney for Claimant  
matt@byinjurylaw.com  
colleen@byinjurylaw.com

Jeffrey R. Brewer, Attorney for Respondent and Kansas Workers Risk Co-Op.  
jbrewer@jbrewerlegal.com  
jlyons@jbrewerlegal.com

William L. Townsley, Attorney for Respondent and Travelers Indemnity Co.  
wtownsley@fleeson.com  
pwilson@fleeson.com

Thomas Klein, Administrative Law Judge